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No. 93-1197

In The

Supreme Court of the United States

October Term, 1993

ALBERT HESS,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

CHARLES F. WALSH,

Petitioner,

- against -

PORT AUTHORITY TRANS-HUDSON CORPORATION,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

BRIEF OF PETITIONERS

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QUESTION PRESENTED

WHETHER PORT AUTHORITY TRANS-HUDSON CORPORATION, A WHOLLY OWNED SUBSIDIARY OF A BI-STATE AGENCY CREATED BY INTERSTATE COMPACT, IS ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT.

THE PARTIES

The Petitioners, who are individual railroad employees, are Albert Hess and Charles F. Walsh. The Respondent, an interstate railroad, is the Port Authority Trans-Hudson Corporation (hereinafter, PATH). PATH is a wholly owned subsidiary of The Port Authority of New York and New Jersey (hereinafter, Port Authority), an entity created by an interstate compact between the States of New York and New Jersey, with the consent of Congress, pursuant to Article I, §10, Clause 3 of the Constitution.

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals in *Albert Hess v. Port Authority Trans-Hudson Corporation*, consolidated with, *Charles F. Walsh v. Port Authority Trans-Hudson Corporation*, (App., 1a-2a)[1], consists solely of a Judgment Order summarily affirming, without comment or analysis, the opinions rendered by the United States District Court for the District of New Jersey. The Court of Appeals' decision is reported at the table in 8 F.3d 811 (3d Cir. 1993). The District Court opinion in *Hess* (App. C, 5a-33a) is reported at 809 F.Supp. 1172 (D.N.J. 1992). The District Court opinion in *Walsh* (App. E, 35a-41a) is reported at 813 F.Supp. 1095 (D.N.J. 1993).

JURISDICTION

The judgment of the Court of Appeals, in the consolidated cases, was entered on September 30, 1993. (App. A, 1a-2a) A petition for rehearing and rehearing en banc was denied on October 27, 1993. (App. F, 42a-43a) The Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit was filed on January 24, 1994 and was granted on March 21, 1994. *See* 114 S.Ct. 1292. This Court has jurisdiction under 28 U.S.C. §1254(1).

[1] All references in this Brief to "App." refer to the appendix contained in the Petition for a Writ of Certiorari. The Court has dispensed with the requirement that a Joint Appendix be filed by Order of May 2, 1994.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Article I, §10, Clause 3, of the United States Constitution provides:

> "No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

The Federal Employers' Liability Act, provides for the jurisdiction of federal district courts at 45 U.S.C. §56, which reads:

> "No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued."
>
> "Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States."

Additionally, portions of the Compact and subsequently enacted bi-state legislation are found at N.Y. Uncon. L. §§6101 *et seq.* and N.J.S.A. §§32:1-1 *et seq.* The New York statutes are identical with the New Jersey statutes. Only the New York statutes are reproduced at App. G, 45a-58a.

STATEMENT OF THE CASE

I. Underlying FELA Claims.

The Petitioners, Albert Hess and Charles F. Walsh, were employees of PATH at the time of their respective accidents. Mr. Hess was a locomotive engineer. On June 29, 1987, he sustained injuries when the train's window malfunctioned and struck his right hand. Mr. Walsh was a railroad conductor. On October 6, 1986, he was injured when a passenger train door malfunctioned and slammed into his right wrist and arm. Each employee sustained personal injuries because of the malfunctioning railroad equipment.

Each employee believed that their respective injuries were caused by the negligence of PATH. Therefore, they filed actions pursuant to the Federal Employers' Liability Act, 45 U.S.C. §§51 *et seq.* The Hess Complaint was filed on May 31, 1990. The Walsh Complaint was filed on May 9, 1989. Both Complaints were filed within the three-year statute of limitations established by 45 U.S.C. §56, but more than one year after the respective accidents.

II. The Port Authority And PATH.

The Third Circuit held that the Respondent, PATH, a wholly owned subsidiary of the Port Authority of New York and New Jersey, is entitled to Eleventh Amendment immunity. The Third Circuit's ruling is entirely dependent on its view that PATH is the equivalent of the compacting states. Petitioners submit that this is incorrect, and therefore undertake a detailed discussion of the Port Authority and PATH and the instruments by which the entities were created and operate.

The Port Authority was created in 1921 to plan, develop, and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor, and to regulate the land in the New York Harbor region. (App. 59a) PATH, a wholly owned subsidiary of the Port Authority, is an interstate railroad operating trains between the States of New York and New Jersey. The Port Authority, and thus PATH, are entities created by an interstate compact between the States of New York and New Jersey, consented to by Congress. August 23, 1921, Chapter 77, 42 Stat. 174; July 1, 1922, Chapter 277, 42 Stat. 822. PATH is entitled to "all of the privileges, immunities, tax exemptions and other immunities of the port authority" and is "subject to suit . . . as if [it] were the port authority itself." NY Uncon. Laws §6612 (App. 51a-54a) Accordingly, the discussion and analysis of whether PATH is entitled to Eleventh Amendment immunity from suit in federal court will primarily be based on an analysis of its parent, the Port Authority. *See Port Authority Trans-Hudson Corporation v. Feeney*, 495 U.S. 299, 300-301

(1990) (cited as *Feeney*); August 23, 1921, Chapter 77, 42 Stat. 174; July 1, 1922, Chapter 277, 42 Stat. 822; N.Y. Uncon. Laws §6612 (App. 51a-54a).

The Port Authority/PATH has described itself, in its 1991 Comprehensive Annual Report, as a "political subdivision" and a "municipal corporate instrumentality" of New York and New Jersey (App. 59a).[2] PATH's self-characterization is consistent with the Compact that created it and designated it as a "body corporate and politic" (Article III of Compact: N.Y. Uncon. Laws §6404) (App. 45a), constituting a "body, both corporate and politic . . . " (Art. VI of Compact: N.Y. Uncon. Laws §6407) (App. 46a-47a). PATH also refers to itself as a "public corporation" (App. 60a) and is referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws §6459 (App. 49a)

PATH is financially self-sustaining. As the Port Authority has explained,

> "The Compact envisions the Port Authority as being financially self-sustaining . . . " (App. 60a)

Its extensive revenue is a result of "tolls, fares, fees, rentals and other user charges." (App. 62a) Further,

> "The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund." (App. 63a)

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[2] The Port Authority's 1992 Comprehensive Report contains statements that are identical, or essentially identical, to those contained in the 1991 Report. For the sake of convenience and clarity, references to the similar language in the 1992 Report will not be repeated at each reference to the 1991 Report.

Additionally, the Port Authority obtains funding through its portfolio investments. Indicative of its financially self-sustaining nature, the Port Authority reported, in its 1991 Report, $47,000,000.00 of earnings on long-term investments and $27,649,000.00 of earnings on short-term investments. (App. 61a)

Not only does PATH raise its own funds, but the Compact and statutes have insulated both the States of New York and New Jersey from any liability arising from the Port Authority, and PATH's, operations. Again, quoting the Port Authority,

> "The agency has neither the power to pledge the credit of either State or any municipality . . . " (App. 60a)

Article VII of the Bi-State Compact (N.Y. Uncon. Laws §6408) (App. 47a) clearly commands:

> "The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof." (emphasis added).

See also, United States Trust Company of New York v. State of New Jersey, 431 U.S. 1, 4-5 (1977) ("The Port Authority was conceived as a financially independent entity, with funds primarily derived from private investors."); N.Y. Uncon. Laws §6459 (App. 49a-50a) (" . . . it shall have no power to pledge the credit of either state or to impose any obligation upon either state or municipality . . . "); 7053 (App. 55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

The Port Authority, and PATH, are completely autonomous from the States of New York and New Jersey. The Port Authority, by statute, has a separate corporate existence. The Port Authority/PATH, indicative of its autonomous nature, can sue and be sued (N.Y. Uncon. Laws §§7101, 6612, 6466) (App. 57a, 51a-54a, 50a-51a). *Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 663 (3d Cir. 1989) (en banc), *cert. denied*, 493 U.S. 850 (1989). The Port Authority/PATH can enter into contracts (N.Y. Uncon. Laws §6612) (App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . , shall be within its sole discretion . . . "); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §6407, N.Y. Uncon. Laws §6951) (App. 46a-47a, 54a).

PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> "The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments." (N.Y. Uncon. Laws §6459) (App. 49a-50a)

Another provision of its effectuating statute provides:

> "All details of the effectuation . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive."

> " . . . no agency, commission or municipality of either or both of the two states shall have . . . any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . . "
>
> (N.Y. Uncon. Laws §6612 – App. 51a-54a)

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact also provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws §6406) (App. 46a), appoint officers and employees and determine their qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws §6415) (App. 47a) and can make rules and regulations (subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws §6419) (App. 48a).

III. The Decisions Below And Related Authority.

PATH filed Motions to Dismiss in the District Court, claiming that the Eleventh Amendment immunized it from suit in federal court. The Motions asserted non-compliance with an alleged condition precedent to its waiver to suit in federal court, N.Y. Uncon. Laws §7107 (N.J.S.A. §32:1-163), that provides:

> "The foregoing consent to suit is granted upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year after the cause of action therefore shall have accrued . . . "

Therefore, although the Complaints were filed within the three-year statute of limitations established by the FELA,

PATH asserted that its waiver required that suit in federal court be filed within one year after an accident.

The District Court in *Hess* assumed that PATH was an entity entitled to assert Eleventh Amendment immunity. It relied on the Third Circuit's opinion in *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey* (hereinafter cited as *PBA*), 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), and other opinions, to find that PATH was entitled to Eleventh Amendment immunity. (App. 15a-16a) The District Court in *Walsh* also relied on *PBA* in holding that PATH was entitled to assert Eleventh Amendment immunity. (App. 37a) Each District Court also held that N.Y. Uncon. Laws §7107 (N.J.S.A. §32:1-163) placed a restriction upon PATH's waiver of Eleventh Amendment protection, found by this Court in *Feeney*, 495 U.S. 299, and that the waiver was only effective if suit was brought within one year of the accident. Because, in each case, suit was brought more than one year after the accident, each case was dismissed. (App. B, 3a-4a and App. D, 34a)

The Third Circuit affirmed, without comment or analysis, both District Court dismissals, and denied Petitioners' petition for rehearing or rehearing en banc. (App. F, 42a-43a)

The three-year statute of limitations has run in each case. The Petitioners have no remedy unless this Court reverses the Third Circuit and holds that PATH is not entitled to Eleventh Amendment immunity from suit in federal court.

SUMMARY OF ARGUMENT

The Port Authority/PATH is not entitled to the immunity from suit in federal court afforded by the Eleventh Amendment to the Constitution, because it is not a state and any judgment against it will not be paid from the treasury of any state. Instead, the Port Authority/PATH is structured as an autonomous entity similar to a political subdivision or municipal corporation.

This Court has repeatedly held that Eleventh Amendment immunity from suit in federal court can only be claimed by a state, or certain agencies exercising the power of the state. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), this Court established the test for determining whether an interstate compact entity is entitled to Eleventh Amendment immunity from suit in federal court. Under *Lake Country* there is a presumption against Eleventh Amendment immunity and only a state – not a county, political subdivision or municipality – is entitled to assert the Eleventh Amendment's protection. Moreover, even though some state entities can assert the Amendment's protection, they can only do so where it is necessary "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself." *Id.* at 401.

Thus, the determinative question here is whether the compact creates an entity comparable to a state. An entity created by interstate compact cannot be afforded Eleventh Amendment protection unless there is "good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States

themselves, and that Congress concurred in that purpose. . . . " *Lake Country*, 440 U.S. at 401.

The language of the interstate compact is significant in determining whether the interstate entity is akin to a political subdivision or a state. The interstate compact between New York and New Jersey calls the Port Authority/PATH, a "body corporate and politic." This Court has recognized that this term refers to a local government or municipal corporation and not a state. Decisions of the state courts of New York and New Jersey, during the period that the Compact was proposed, also demonstrate that the compacting states recognized that term to apply to local governments and municipal entities and not states. A review of the Eleventh Amendment and its history also leads to the conclusion that "bodies corporate and politic" were not intended to be afforded Eleventh Amendment protection. A review of the legislative history of Congress' consent to the Compact also reveals the understanding by Congress that the entity was not to be afforded protection from suit in federal courts. Consistent with these numerous sources is the Port Authority/PATH's own statement, contained in its legally mandated Comprehensive Report, that it is a political subdivision.

A review of the autonomous nature of the entity, including its purpose in the regulation of land, separate corporate existence, ability to sue and be sued, ability to contract, and sweeping other powers and authorities, also support the conclusions reached from the Compact that the Port Authority/PATH is structured as an autonomous entity akin to a municipal subdivision and not the agency

of either compacting state. Further support for the conclusion that the entity is not entitled to Eleventh Amendment protection is that it is not subject to the control of either compacting state. For instance, the State of New York has resorted to suit against PATH to compel it to stop polluting the Jamaica Bay. The entity's history shows an agency that has been adverse and antagonistic to the goals of its compacting states.

Because of the historical purpose of the Eleventh Amendment – protecting state treasuries – the fiscal structure of the interstate entity, and whether a judgment against the entity can be collected from the compacting states' treasuries, must also be carefully analyzed to determine whether the interstate entity is akin to a political subdivision or a state. That analysis leads to the conclusion that the Port Authority/PATH is also not entitled to Eleventh Amendment protection from suit in federal court because it is financially self-sufficient. Further, any judgment against it cannot become the liability of either compacting state. The Compact creating the Port Authority, and subsequent legislation, fully insulated both New York and New Jersey from any judgment rendered against the interstate entity. Accordingly, a judgment against the Port Authority/PATH is not the same as a judgment against a state.

Thus, the Port Authority's Compact, its own self-description, its structure, its actual relationship with the compacting states, and its fiscal structure demonstrate that it is a financially self-sustaining and autonomous entity that neither Congress nor the states intended to cloak with Eleventh Amendment immunity.

ARGUMENT

I. PATH IS NOT ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT BECAUSE IT IS NEITHER A STATE NOR AN ARM OF THE STATE.

A. The Presumption Against Eleventh Amendment Immunity Contained In *Lake Country* Is Consistent With The Constitutional Plan Under Which States, Creating An Interstate Compact Entity, Surrender Their Sovereignty As It Relates To That Entity And Its Functions.

This Court has repeatedly held that Eleventh Amendment immunity from suit in federal court can only be claimed by a state, or certain agencies exercising the power of the state. In *Lake Country*, concerning an interstate compact entity created by the States of California and Nevada (the Tahoe Regional Planning Agency), this Court established the test for determining whether an interstate compact entity is entitled to Eleventh Amendment immunity from suit in federal court. The test establishes a presumption against Eleventh Amendment immunity. The Court held,

> "By its terms, the protection afforded by the Amendment is only available to 'one of the United States.' It is true, of course, that some agencies exercising state power have been permitted to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and

municipalities, even though such entities exercise a 'slice of state power.' "

"If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment." 440 U.S. at 401.

See also Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 280 (1977); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890).

The *Lake Country* presumption against Eleventh Amendment immunity for interstate compact entities is consistent with the constitutional plan under which those entities exist. Sovereign immunity is reserved for sovereign entities. Although the states were fully sovereign before entering the Union, when the states joined the Union they surrendered some of their sovereignty as part of the "plan of the convention." *Pennsylvania v. Union Gas Company*, 491 U.S. 1, 19-20 (1989); *Principality of Monaco v. State of Mississippi*, 292 U.S. 313, 323-324 (1934); *Hans v. State of Louisiana*, 134 U.S. 1, 13 (1890).

One area in which the states relinquished their sovereignty was their ability to make compacts and agreements with other sovereigns. Before joining the Union their ability to do so was an inherent right of the state as

a sovereign. Upon joining the Union, that right was limited by the Constitution. Article I, §10, Clause 3, provides:

"No State shall, *without the Consent of Congress*, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, *enter into any Agreement or Compact with another State, or with a foreign Power*, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." (emphasis added)

As members of the Union, previously sovereign states now have to seek the consent of Congress before entering agreements with other states. The role of Congress is not superficial. As this Court explained in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 282, n. 7 (1959),

"Congress must exercise national supervision through its power to grant or withhold consent, or to grant it under appropriate conditions. The Framers thus astutely created a mechanism of legal control over the affairs that are projected beyond State lines . . . They allowed interstate adjustments but duly safeguarded the national interest."

See also, State ex. rel Dyer v. Sims, 341 U.S. 22, 27 (1951) ("A compact is more than a supple device for dealing with interests confined within a region. That it is a means of safeguarding the national interest is well illustrated in the compact now under review [Ohio River Valley Water Sanitation Compact]."); *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 483-485 (1978) (White, J., dissenting).

Not only do compacting states relinquish their sovereignty to the federal government, but they also surrender

their sovereignty to each other. Once a state joins with another state in creating a separate entity to perform certain functions, it is limited by the actions of the other state.

An example will make this clear. In 1927 the New Jersey legislature enacted legislation to direct the Port Authority to prepare for passenger service operations. Previously, it had limited its service to freight trains. Had New Jersey retained its sovereignty that policy would have been effectuated. Because the Port Authority was an interstate compact entity, the implementation of New Jersey's political and public goals required the consent of New York. New York did not pass similar legislation. This "ended any legislative effort to involve the Port Authority in an active role in commuter transit for the next 30 years." *United States Trust*, 431 U.S. at 6. New Jersey had relinquished a portion of its sovereignty, as it related to the port district, to New York. When New York did not agree with New Jersey, New Jersey could not act. *Id.*

This example is not unique. It has been written that "perhaps the greatest fear and criticism of interstate compacts and interstate compact agencies is that they result in some diminution of state sovereignty and ability to act independently in certain circumstances." James M. Jackson, *Enhancing State Regulation Through The Compact Clause*, 9 Journal of Insurance Regulation 151, 162 (Dec. 1990).

Because the states relinquish their sovereignty (to both Congress and other states) when they enter into interstate compacts, they cannot vest interstate compact

agencies with sovereignty. Also, because they have relinquished their sovereignty, neither the states nor the entity, can assert sovereign immunity to escape the jurisdiction of the federal courts. The test set forth in *Lake Country* recognizes the diminution in the sovereignty of the compacting states because of our constitutional structure.

B. The Language Of The Compact Creating The Port Authority/PATH Manifests The States', And Congress', Intention That It Not Be Considered A State Entity And That It Not Be Entitled To Eleventh Amendment Immunity.

The Port Authority/PATH is more akin to a county or a political subdivision, than a state. As such, it is not entitled to Eleventh Amendment protection from suit in federal court. *Lake Country*, 440 U.S. at 401. Petitioners submit that any discussion of the Port Authority/PATH's waiver, in the courts below, was irrelevant. The Port Authority/PATH is not, and never has been, a state nor a state entity entitled to assert Eleventh Amendment immunity. It is not a sovereign and is not entitled to any form of sovereign immunity. Thus, it cannot waive what it is not entitled to have.

PATH is described in the Compact between the States of New York and New Jersey, that was approved by Congress, as a "body corporate and politic." (Article III of Compact: N.Y. Uncon. Laws §6404) (App. 45a) The Compact further provides that the entity shall constitute a "body, both corporate and politic. . . . " (Art. VI of Compact: N.Y. Uncon. Laws §6407) (App. 46a-47a) It is

also referred to by statute as a "municipal corporate instrumentality of the two states." N.Y. Uncon. Laws §6459 (App. 49a)

This Court has previously considered the term "body corporate and politic." The conclusion drawn from those opinions is that this term designates an entity that is similar to a political subdivision or public corporation, and not a state. In *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989), this Court discussed the designation of "bodies politic and corporate." The issue in *Will* was whether the word "person" in the Civil Rights Act, 42 U.S.C. §1983, referred to states and state officials. The Court held that §1983 did not include states. Its analysis refers to the term "bodies corporate and politic" as used in the Dictionary Act. The Court concluded that the traditional use of the term "body corporate and politic" was to refer to "corporations, both private and public (municipal), and not to include the States." *Id.* at 69-70.[3]

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[3] *See also, Will*, 491 U.S. at 69, n. 9, *citing*, 1 B. Abbott, *Dictionary of Terms and Phrases Used in American Jurisprudence* 155 (1879) (defining bodies politic and corporate as the "most exact term for 'public corporation' "); W. Anderson, *A Dictionary of Law* 127 (1893) (bodies politic and corporate defined as the "most exact expression for a public corporation or corporation having powers of government"); *Black's Law Dictionary* 143 (1891) ("body politic" is a "term applied to a corporation, which is usually designated as a 'body corporate and politic' " and "is particularly appropriate to a public corporation invested with powers and duties of government"); 1 A. Burrill, *A Law Dictionary and Glossary* 212 (2d ed. 1871) ("body politic" is a "term applied to a corporation, which is usually designated as a body corporate and politic").

In *United States v. Fox*, 94 U.S. 315 (1876) this Court also found that the term "bodies politic" did not refer to a sovereign. The issue in this case was whether the devise of real property to the United States, under New York intestate laws, was permissible. The Court held that the devise was void. This Court ruled that the word "person" in the New York statute concerning the transfer of land did not include transfer to a sovereign, but only to a person or corporation. The Court explained that "person" included "bodies politic," and that bodies politic were entities "deriving their existence and powers from legislation." *Id.* at 321. Because sovereigns (such as the United States or one of the states) do not derive their power from legislation, a sovereign was not included as a person to whom property could be transferred. Thus, the term "bodies politic" did not describe a sovereign. The Port Authority/PATH is not a sovereign, and is therefore not entitled to sovereign immunity, because its existence and power derives from legislation, that is, the Compact.

Will also is instructive in defining the term "municipal corporate instrumentality." This is one of the descriptions of PATH contained in its enabling legislation. N.Y. Uncon. Laws §6459 (App. 49a). In *Will*, the Court stated:

> "A public corporation, in ordinary usage, was another term for a municipal corporation, and included towns, cities, and counties, but not States."

491 U.S. at 69, n. 9.

The use of the term "body corporate and politic" was later changed in the Dictionary Act and replaced with "partnerships and corporations." In making this revision

it was said that body corporate and politic "is precisely equivalent to 'corporations'," and therefore was "redundant . . . " *Ngiraingas v. Sanchez*, 495 U.S. 182, 191 (1990), *citing from*, 1 *Revision of the United States Statutes as Drafted* 19 (1872). Thus, the term used in PATH's Compact and enabling legislation has traditionally not referred to states, but to municipal entities that are not entitled to Eleventh Amendment protection.

In addition to a review of decisions of this Court, and sources relied upon by it, a review of New York and New Jersey state cases also confirm that the term "bodies corporate and politic" refers to municipal entities and not states. Several cases in New York and New Jersey state courts, handed down during the period that the interstate compact was enacted, suggest that the term "bodies corporate and politic" was neither used nor understood to refer to states. The term was used when referring to local government bodies and municipal or private corporations. Thus, the logical conclusion is that the Compact also used the term to refer to a municipal entity and not a state or state agency.[4]

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[4] *See Langdon v. Mayor of City of New York*, 133 N.Y. 628, 634-636, 31 N.E. 98 (N.Y. 1892) (body politic used to refer to a municipal body [New York City] and not the state); *In re Piers Old Nos. 8, 9, 10 and 11, North River, in City of New York*, 228 N.Y. 140, 126 N.E. 809 (N.Y. 1920) (similar to and citing *Langdon*); *People Wallaston Realty Co. v. Craig*, 229 N.Y. 23, 27, 127 N.E. 591 (N.Y. 1920) (bodies politic or corporate referring to those from whom property can be taken by eminent domain); *In re East 149th Street in City of New York*, 188 N.Y.S. 579 (N.Y.A.D. 1 Dept. 1921), *aff'd., In re: City of New York*, 232 N.Y. 511, 134 N.E. 550 (N.Y. 1921); *People ex. rel. Bronx Parkway Commission v. Common Council of City of Yonkers*, 229 N.Y. 1, 127 N.E. 595 (N.Y. 1920)

A historical review of the Eleventh Amendment also supports the conclusion that the term "bodies corporate and politic" does not include states. It is generally accepted that the Eleventh Amendment was a reaction to the decision of *Chisholm v. State of Georgia*, 2 U.S. (2 Dall.) 419 (1793). That decision was handed down on February 18, 1793. On February 19, 1793, a resolution was introduced in the House of Representatives stating:

> "[N]o State shall be liable to be made a party defendant in any of the Judicial Courts established or to be established under the authority of the United States, at the suit of any person or persons, citizens or foreigners, *or of any body politic or corporate* whether within or without the United States."

1 C. Warren, *The Supreme Court in United States History* 101 (rev. ed. 1937), *citing, Pennsylvania Journal* (February 20, 1793) (emphasis added). The text of the resolution, that would develop into the Eleventh Amendment, clearly expresses that "bodies politic and corporate" were not the equivalent of any state, but were separate entities

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(local government body created to establish a public park, was referred to as a body politic); *Attorney General v. Borough of Ocean Grove, in Manmouth County*, 96 N.J.L. 158, 114 A. 15 (N.J. Ct. Err. & App. 1921) (body politic used to refer to a borough); *People ex. rel. Shipston v. Thompson*, 187 N.Y.S. 395 (N.Y. Sup. 1921) (the term "body politic" was used to refer to a municipal entity that was vested with many of the same legal rights as the Port Authority/PATH); *Frawley v. Tenafly Trans. Co.*, 95 N.J.L. 405, 113 A. 242 (N.J. Ct. Err. & App. 1921) (refers to a private corporation as a "body politic"); *Archibald v. Maurath*, 92 N.J. Eq. 357, 113 A. 6 (N.J. Ch. 1921) (refers to body politic or corporate as an entity being subject to state taxation).

that the states were afraid would bring suit against them. These "bodies corporate and politic" were not to be protected by the Eleventh Amendment. On the contrary, the Amendment was to protect states from them and other potential adverse litigants. Thus, PATH, as a "body corporate and politic," is an entity against which the states are protected, but not an entity that is entitled to claim the protection of the Eleventh Amendment. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 283-284 (1985) (Brennan, J., dissenting).

The designation of PATH as a "body corporate and politic" and a "municipal corporate instrumentality" is contrary to its claim that it is entitled to the Eleventh Amendment protection reserved for states. Those terms define it as a political subdivision or municipal entity that is not entitled to Eleventh Amendment protection. *See Lake Country*, 440 U.S. at 401.

C. The Language Of The Congressional Provisos Included In The Statutes Consenting To The Compact, Manifests Congress' Intention That The Port Authority/PATH Not Be Considered A State Entity And That It Not Be Entitled To Eleventh Amendment Immunity.

The conclusion that the Port Authority/PATH is not entitled to Eleventh Amendment protection is bolstered by the terms of Congress' acceptance of the Compact in 1921, 42 Stat. 174, and the amendment of the following year, 42 Stat. 822. When the original Compact was presented for Congress' approval, pursuant to Article I, § 10, Clause 3 of the Constitution, concerns were expressed regarding appropriate reservations for protecting federal

rights and interests in the areas that the new Port Authority would be governing. In a letter of June 30, 1921, Secretary of War John W. Weeks wrote to the House Committee considering the Joint Resolution adopting the Compact, and he noted that,

> "it is not improbable that actions at law will arise through which the consent of Congress as granted by the resolution will be subjected to court review, the suggestion is therefore raised whether the phraseology of the resolution may not be changed to better effect its intended purpose."

Development and Administration of the Port of New York, H.R. Rep. No. 279, 67th Cong., 1st Sess. 5 (July 21, 1921) (letter of June 30, 1921, from Secretary Weeks to Rep. Goodykoontz).[5] Secretary Weeks suggested the reserving language which subsequently appeared as the first section of the 1921 Joint Resolution: "*Provided*, That nothing- . . . contained [in the Compact] shall be construed as impairing or in any manner affecting any right or jurisdiction of the United States in and over the region which forms the subject of said agreement." 42 Stat. 174, 180.

Apprehension about reservations of federal "rights" and "jurisdiction," particularly in the context of federal court proceedings involving the New York Port Authority, were revisited by Congress the following year when

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[5] *See also Establishment of the Port of New York Authority*, S. Rep. No. 161, 67th Cong., 1st Sess. (June 21, 1921) (noting that Secretary of the Treasury Andrew Mellon was likewise concerned that language be added "that nothing in the compact shall be construed as waiving or surrendering any right now vested in the Federal Government.").

New York and New Jersey asked for Congressional consent to a comprehensive plan for developing the port. The above language was repeated in the 1922 Joint Resolution, but as one of three clauses.[6] On the House floor, concern was expressed about these reservations and the powers being given to the New York Port Authority. Congressman Montague of Virginia said:

> "[I]f the Port of New York Authority has any authority to effectuate this agreement, it must derive that authority from the agreement itself, to which this Congress must consent. So that the language in question [the newly-added proviso] is either surplusage or in violation of the jurisdiction of Congress. I do not think Congress should undertake by language, however impotent, to give any *corporate body* an authority which must be found in an agreement to which Congress alone can consent and can not authorize."

62 Cong. Rec. (part 8), 67th Cong., 2d. Sess. 7976 (June 1, 1922) (remarks by Rep. Montague) (emphasis added).

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[6] In the first paragraph of the 1922 Joint Resolution, consent to the Comprehensive Plan was "subject always to the approval of the officers and agents of the United States as required by Acts of Congress touching the jurisdiction and control of the United States over matters, or any part thereof, covered by this resolution." 42 Stat. 822.

As if this was not enough, Congress added yet another proviso at the conclusion of the Resolution: "[n]o bridges, tunnels, or other structures shall be built across, under or in any of the waters of the United States, and no change shall be made to the navigable capacity or condition of any such waters, until the plans therefor have been approved by the Chief of Engineers and the Secretary of War." 42 Stat. 822, 826.

This statement is significant not only in reflecting at least one Congressman's understanding of the legal status of the New York Port Authority, but also in expressing concern about federal court jurisdiction over the entity. Representative Montague was troubled that the two new provisos concerning federal navigations rights and servitudes would be read by courts as a narrow exemption. *See id.* (remarks by Rep. Montague) ("I do not know but that the Government would be protected in any event – not by the provisos, because I think the courts would interpret this so-called authorization as either a nullity or a consent.") Nonetheless, Montague's colleague, Mr. Fairchild, offered a helpful point:

> Mr. FAIRCHILD. If the gentleman will yield further, the first proviso [the one concerning "rights" and "jurisdiction"] is broader than bridges, *and is as broad as any possible right the United States Government can have.*
>
> Mr. MONTAGUE. The gentleman is entirely right. If the agreement to which we are asked to consent does not confer the authorization upon the Port of New York Authority, Congress cannot confer it by the language to which I object.

Id. at 7977 (emphasis added).

Petitioners acknowledge that while these statements do not definitively disclaim a Congressional intent to cloak the Port Authority with Eleventh Amendment immunity, they are highly suggestive that Congress surely did not mean such a result. The proviso reserving all federal "rights" and "jurisdiction" (contained in both the 1921 and 1922 Joint Resolution) should be construed broadly, just as Representatives Montague and Fairchild

discussed. These provisos can be fairly read to answer the concerns of legislators and administration officials that the Port Authority would not be amenable to suit in federal court. Petitioners submit, therefore, that the plain meaning of the Compact (and the later comprehensive plan), as well as the Congressional Joint Resolutions, reveal that there was no intent to grant the Port Authority Eleventh Amendment immunity.

D. The Port Authority/PATH Characterizes Itself As A Political Subdivision And As Such Is Not Entitled To The Protection Of The Eleventh Amendment From Suit In Federal Court.

PATH has stated that it is a political subdivision. Thus, it is not entitled to the protection from suit in federal court afforded by the Eleventh Amendment. *Lake Country*, 440 U.S. at 401; *Mt. Healthy*, 429 U.S. at 280. In its Comprehensive Annual Report PATH unequivocally states,

> "The Port Authority of New York and New Jersey is a municipal corporate instrumentality and *political subdivision* of the States of New York and New Jersey, created in 1921 by compact between the two States and thereafter consented to by the Congress of the United States." (emphasis added) (App. 59a)

The obligation of PATH to issue an annual report is mandated by its enabling Compact. (Art. VII of Compact: N.Y. Uncon. Laws §6408) (App. 47a)

It is curious that PATH calls itself a political subdivision in its mandated report, but has argued just the opposite in an attempt to cloak itself with Eleventh Amendment immunity from suit in federal court. The Port Authority/PATH's self-characterization is consistent with the characterization contained in its Compact and enabling legislation. This Court should ignore this ruse and accept PATH's own description that it is a political subdivision.

E. The Port Authority/PATH Has A Purpose, Separate Legal Identity And Powers That Make It Similar To A Political Subdivision Rather Than An Agency Of A State.

The Port Authority/PATH, like the TRPA that was the agency involved in *Lake Country*, was created to regulate and coordinate the development of land. In *Lake Country*, this Court said that "the regulation of land is traditionally a function performed by local governments." 440 U.S. at 402. This Court found that that factor supported its conclusion that TRPA was like a political subdivision, and not a state, and therefore, was not entitled to Eleventh Amendment immunity. The Port Authority was created in 1921 to plan, develop and operate facilities of transportation and commerce in the "Port District," which consists of 1,500 square miles centering about New York Harbor. (App. 59a) The Port Authority was created to regulate the land in the New York Harbor region. PATH, its subsidiary, operates an interstate railroad that services this region. The Port Authority/PATH is also performing a function traditionally performed by local governments and not states. It too, therefore, is not entitled to Eleventh Amendment immunity.

PATH, like the entity reviewed in *Lake Country*, is an entity autonomous from the States of New York and New Jersey. It has significant independent powers. The Port Authority/PATH is essentially a government unto itself. It is, therefore, not entitled to Eleventh Amendment immunity. *Lake Country*, 440 U.S. at 400-401.

The Port Authority, by statute, has a separate corporate existence. The Port Authority/PATH, indicative of its autonomous nature, can sue and be sued (N.Y. Uncon. Laws §§7101, 6612, 6466) (App. 57a, 51a-54a, 50a-51a). *Fitchik*, 873 F.2d at 663. The Port Authority/PATH can enter into contracts (N.Y. Uncon. Laws §6612) (App. 51a-54a) ("all details of the effectuation, including . . . contracts . . . , shall be within its sole discretion. . ."); and can purchase, sell or lease land, or own and hold real or personal property (Art. VI of Compact: N.Y. Uncon. Laws §6407, 6951) (App. 46a-47a, 54a).

As was the entity in *Lake Country*, PATH has significant authority to make its own rules and regulations, and to enforce them. Relevant portions of its enabling act are as follows:

> "The Port Authority . . . is hereby vested with all necessary and appropriate powers not inconsistent with the Constitution of the United States or of either state, to effectuate the [comprehensive plan], except the power to levy taxes or assessments." (N.Y. Uncon. Laws §6459) (App. 49a-50a)

Another provision of its effectuating statute provides:

> "All details of the effectuation, including but not limited to details of financing, leasing,

> rentals, tolls, fares, fees and other charges, rates, contracts and services . . . shall be within its sole discretion and its decision . . . shall be controlling and conclusive."
>
> "So long as any facility constituting a portion of the port development project shall be owned, controlled or operated by the Port Authority (either directly or through a subsidiary corporation . . .), no agency, commission or municipality of either or both of the two states shall have jurisdiction over such facility nor shall [they] have any jurisdiction over the terms or method of effectuation of all or any portion thereof by the Port Authority . . . "
>
> "Nothing in this act shall be deemed to prevent the Port Authority from establishing, acquiring, owning, leasing, constructing, effectuating, developing, maintaining, operating, rehabilitating or improving all or any portion of the port development project through a wholly owned subsidiary . . . *** Such subsidiary corporation shall have all of the powers vested in the Port Authority itself . . . , except that it shall not have the power to contract indebtedness."
>
> (N.Y. Uncon. Laws §6612 - App. 51a-54a)

Besides these sweeping powers, and the prohibition against the interference by any other private or public entity, the Compact provides that the Port Authority commissioners may adopt by-laws for its management (Art. V of Compact: N.Y. Uncon. Laws §6406) (App. 46a), appoint officers and employees and determine their qualifications and duties (Art. XIV of Compact: N.Y. Uncon. Laws §6415) (App. 47a) and can make rules and regulations

(subject to state concurrence) (Art. XVIII of Compact: N.Y. Uncon. Laws §6419) (App. 48a).

The Port Authority and PATH have been vested with enormous autonomy and sweeping powers over the 1,500 square miles under its exclusive jurisdiction. It is much more akin to a political subdivision than an arm of the compacting states. Therefore, the Port Authority/PATH is not entitled to the protection from suit in federal court afforded by the Eleventh Amendment.

F. PATH Is Adverse To, And Not Subject To The Control Of, Its Compacting States, And This Relationship Between PATH And The States Of New York And New Jersey Demonstrates That It Is Not The Equivalent Of Either State And Is Not Entitled To Eleventh Amendment Protection.

In *Lake Country*, 440 U.S. at 402, this Court said that the TRPA was not an arm of the states subject to their control. This factor weighed heavily against Eleventh Amendment protection, noting that its conclusion was "perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA." *Id.* at 402. The same is true with PATH. In *People v. The Port of New York Authority*, 64 Misc.2d 563, 315 N.Y.S. 2d 9 (N.Y. Sup. 1970), the State of New York resorted to litigation and sued the Port Authority to seek an injunction to stop it from polluting the water in Jamaica Bay. This "forcefully demonstrate[s]" that the Port Authority is not an arm of a state and is not subject to its control.

An additional example shows the lack of control by the states over the Port Authority (and thus PATH). In 1958, the State of New Jersey wanted the Port Authority to operate interstate passenger rail trains between New York and New Jersey, a function now performed by PATH. The New Jersey legislature introduced a bill that would have had the Port Authority "take over, improve, and operate" these trains. Had the Port Authority been subject to the control of its compacting states, it would have cooperated with the legislative goals of New Jersey. Instead,

> "[t]he bill was vigorously opposed by the Port Authority on legal and financial grounds. The Port Authority also *retaliated*, in a sense, by including a new safeguard in its contracts with bondholders. This prohibited the issuance of any bonds, secured by the general reserve fund, for a new facility unless the Port Authority first certified that the issuance would not 'materially impair the sound credit standing' of the Port Authority." *United States Trust*, 431 U.S. at 8 (emphasis added).

Because of the Port Authority's opposition and retaliatory actions, the bill was not passed and the goals of a compacting state were thwarted. *Id.* This behavior was inconsistent with an agency of the compacting states, that was subject to their control.

In his study, *Interstate Compacts in the Political Process* (University of North Carolina Press - Chapel Hill 1967), Weldon V. Barton discusses the Port Authority. Indicative of an independent entity not subject to the control of either compacting state, Mr. Barton writes,

> "Attempts to impose controls on the Authority from the outside (either to force the agency to engage specific problems or to prevent actions by the Authority that would have been detrimental to specific interests) have been sporadic and unco-ordinated and *have involved bargaining and give-and-take between the compact agency and potentially-controlling groups, agencies, and officials.*" *Id.* at 69 (emphasis added).

He also writes,

> "[I]nvolvement of the interstate authorities with mass transit and other urban problems is highly dependent upon bargaining between governors, mayors, and other officials . . . and the compact administrators . . . " *Id.* at 87.

If the Port Authority/PATH were an arm of either the State of New York or New Jersey, the governors of the states would not have to resort to bargaining to have it comply with their goals and the goals of the states. Their need to do so is demonstrative of the Port Authority/PATH's independence. As an independent entity, it is much more akin to a political subdivision or municipality than it is to a state or a state agency.

II. PATH IS NOT ENTITLED TO SOVEREIGN IMMUNITY FROM SUIT IN FEDERAL COURT UNDER THE ELEVENTH AMENDMENT BECAUSE A JUDGMENT AGAINST PATH IS NOT THE SAME AS A JUDGMENT AGAINST EITHER OF ITS COMPACTING STATES. THE PORT AUTHORITY/PATH IS FINANCIALLY SELF-SUSTAINING AND THE STATES OF NEW YORK AND NEW JERSEY ARE FULLY INSULATED AGAINST ANY JUDGMENT RENDERED AGAINST PATH.

A. Eleventh Amendment Sovereign Immunity Is Only Extended To State Associated Entities Where It Is Necessary To Protect The Treasury Of A State.

This Court recognized, in *Lake Country*, that the purpose of extending the Eleventh Amendment immunity to a state associated entity is "to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself," *Lake Country*, 440 U.S. at 401; *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, n. 34 (1984) *(citing Lake Country); see also Ford Motor Company v. Dept. of Treasury of State of Indiana*, 323 U.S. 459 (1945); *Edelman v. Jordan*, 415 U.S. 651, 663 (1974).

This rule is consistent with the original purpose of the Eleventh Amendment. In *Petty*, 359 U.S. 275, n. 1, this Court explained that when the Eleventh Amendment was first proposed,

> "More than the dignity of the state was probably at issue, however. When the Eleventh Amendment was proposed many states were in financial difficulties and had defaulted on their debts.

> The states could therefore use the new amendment not only in defense of theoretical sovereignty, but also in a more practical way to forestall suits by individual creditors!"

See also, Pennhurst, 465 U.S. at 151 (1984) (Stevens, dissenting) ("There is general agreement that the Amendment was passed because States were fearful that federal courts would force them to pay their Revolutionary War debts, leading to their financial ruin.")

B. The Port Authority/PATH Is Not Entitled To Eleventh Amendment Protection Because Any Judgment Against It Will Not, And Cannot, Be Paid From The Treasuries Of Either Compacting State.

When the fiscal character of the Port Authority of New York and New Jersey (and its fully owned subsidiary, PATH) is analyzed, it becomes evident that PATH is not an agency of either New York or New Jersey. It is, instead, a financially self-sustaining entity that is responsible for its own debts. Any debt that it incurs, and any judgment against it, will not be paid from the treasury of either New York or New Jersey. Therefore, it is not entitled to the sovereign immunity afforded by the Eleventh Amendment.

PATH's money does not predominantly come from the states. This Court recognized in *United States Trust*, 431 U.S. at 4, that the Port Authority/PATH "was conceived as a financially independent entity with funds

primarily derived from private investors." This is confirmed by the Port Authority that has stated,

> "The Compact envisions the Port Authority as being financially self-sustaining and, as such, it must raise the funds necessary for the construction and acquisition of facilities upon the basis of its own credit." (App. 60a)

The Port Authority Comprehensive Financial Report (App. H, 59a-63a) reports an increase in gross operating revenues and states that this is "primarily attributable to the effort of" toll increases and higher flight fees. (App. 60a-61a)[7] At another portion, the Port Authority reports,

> "The costs of providing facilities and services to the general public on a continuous basis are recovered primarily in the form of tolls, fares, fees, rentals and other user charges." (App. 62a)

The Report also documents,

> "The Port Authority finances construction and acquisitions of the facilities primarily by issuing bonds, notes and other obligations and through application of its reserve fund." (App. 63a)

Additionally, the Port Authority obtains funding through its portfolio investments. Indicative of its self-sustaining financial posture, the Port Authority reported $47,000,000.00 of earnings on long-term investments and $27,649,000.00 of earnings on short-term investments.

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[7] The 1992 Report states that "Gross operating revenues totalled $1,933,512,000 in 1992, an increase of $76,617,000 or 4.1% over 1991. This growth is primarily attributable to . . . the 1991 toll increase and increased airport revenues from higher flight fees, rental agreements, and overseas passenger volume."

(App. 61a) *See also* N.Y. Uncon. Laws §§6459 (App. 49a) (reference to authority of the Port Authority to issue bonds and securities); 7053 (App. 55a-57a) (authorizing the Port Authority to issue bonds as the general obligations of the Port Authority); 7002 (App. 54a-55a) (establishing a general reserve fund to place surplus revenues to be used to pledge as security or to be used for its undertakings).

The Port Authority is, as the Compact envisions, "financially self-sustaining." (App. 60a) Its money does not come from the States of New York or New Jersey, and, therefore, it is not entitled to any Eleventh Amendment immunity.

Equally, if not more important than the fact that the Port Authority's money does not come from any state, is the nature of the states' obligation to PATH. The States of New York and New Jersey do not appropriate money to the Port Authority. Further, and of vital import, a judgment against Port Authority/PATH *will not* impact on the treasury of either state. Article VII of the Bi-State Compact (N.Y. Uncon. Laws §6408) (App. 47a) clearly commands:

> "The Port Authority *shall not* pledge the credit of either state except by and with the authority of the legislature thereof." (emphasis added)

The Comprehensive Financial Report states,

> "The agency neither has the power to pledge the credit of either state or any municipality . . . " (App. 60a)

See also N.Y. Uncon. Laws §6459 (App. 49a-50a) (" . . . it shall have no power to pledge the credit of either

state or to impose any obligation upon either state or municipality . . . "); 7053 (App. 55a-57a) ("bonds . . . shall be direct and general obligations of the Port Authority, and its full faith and credit shall be pledged for the prompt payment of the principal and interest thereof").

Although Compact Article XV provides a mechanism for state appropriations to the Port Authority/PATH, those appropriations are not mandatory. Further, even the voluntary appropriations that can be made under that Article are limited to "salaries, office and other administrative expenses." It provides:

> "Unless and until the revenues from operations conducted by the port authority are adequate to meet all expenditures, the legislature of the two states shall appropriate, in equal amounts, annually, for the salaries, office and other administrative expenses, such sum or sums as shall be recommended by the port authority *and approved by the governors of the two states*, but each state obligates itself hereunder only to the extent of one hundred thousand dollars in any one year." (emphasis added) (N.Y. Uncon. Laws §6416) (App. 48a)

Any appropriation by either New York or New Jersey, in response to a judgment against Port Authority/PATH, is solely discretionary. No appropriation can be made to the Port Authority/PATH, by either compacting state, unless the appropriation is recommended and approved by the governors of the two states. That voluntary appropriation does not trigger Eleventh Amendment immunity. *Fitchik*, 873 F.2d at 661. As in *Lake Country*, a

judgment against the Port Authority/PATH is not enforceable against any state.

The District Courts below, relying on *PBA*, 819 F.2d 413 (3d Cir.), *cert. denied*, 484 U.S. 953 (1987), incorrectly determined that the Port Authority/PATH was entitled to Eleventh Amendment protection because the judges in *PBA* had inaccurately read and misquoted Article XV.[8] In *Feeney*, four members of this Court recognized that *PBA* was in error and, agreeing with the Second Circuit, found that the Port Authority/PATH was not entitled to Eleventh Amendment immunity from suit in federal court. 495 U.S. at 316-318 (Justices Brennan, Marshall, Blackmun and Stevens, concurring).

Further evidence that a judgment against PATH is not a judgment against either of the compacting states is the existence of insurance. In a section titled, "Risk Management," the Port Authority reports that it carries both ordinary insurance and excess public liability insurance. Further, it "provides for uninsured potential losses through its self-insurance program by appropriation from the Consolidated Bond Reserve Fund to the Operating Fund and by charging operating expenses as incurred." (App. 62a)

Accordingly, extending Eleventh Amendment protection to PATH is not necessary to protect the treasuries of either New York or New Jersey, its compacting states.

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[8] The Third Circuit cited Compact Article XV as follows: "Unless . . . the revenues from operations are adequate to meet all expenditures, the legislatures of the two states shall appropriate [the amounts needed]." *PBA* at 416.

CONCLUSION

It is respectfully requested that the decisions of the United States Court of Appeals for the Third Circuit in *Hess* and *Walsh* be reversed and remanded for further proceedings.

Respectfully submitted,

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